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[26/02/2003; High Court at Wellington (New Zealand); Appellate Court]
P v The Secretary for Justice [2003] NZLR 54, [2003] NZFLR 673

P v The Secretary for Justice

AP 5/03

High Court Wellington

[2003] NZFLR 673; 2003 NZFLR LEXIS 10

26 February 2003

GODDARD J.:

[1] This is an appeal against the issue of a warrant for the return of two children, EP and ZP, born in Australia on 3 April 1996 and 28 August 1998 respectively. The effect of the warrant is that these two children are to be returned to their father in Australia forthwith. The warrant was issued by Judge Grace in the Family Court at Porirua, following application by the children's father under the provisions of the Hague Convention. The Hague Convention ("the Convention") was incorporated into New Zealand law by s 12 and 13 of the Guardianship Amendment Act 1991 ("the Act") and the Schedule to that Amendment Act.

[2] Section 12 of the Act provides for applications to be made to the Court for the return of children abducted to New Zealand. Four criteria are set out in s 12, each of which an applicant for the return of the children abducted to New Zealand is required to establish. The four criteria are as follows:

(a) That a child is present in New Zealand; and

(b) That the child was removed from another Contracting State in breach of that person's rights of custody in respect of the child; and

(c) That at the time of that removal those rights of custody were actually being exercised by that person, or would have been so exercised but for the removal; and

(d) That the child was habitually resident in that Contracting State immediately before the removal.

[3] Section 12(2) provides that where the Court is satisfied that the grounds of the application are made out the Court must make an order that the child be returned forthwith to the country from which it was removed. Section 12(2) is however subject to the Court's discretion to refuse an order to return a child on certain specified grounds, including inter alia whether there is a grave risk that the child's return would expose the child to harm or

otherwise place it in an intolerable situation. None of the grounds under s 13 are invoked in this case.

[4] The concept of "removal" in s 12 is defined in the Act as meaning:

The wrongful removal or retention of the child within the meaning of Article 3 of the Convention. (Emphasis added.)

[5] As in s 12, the terms "removal" and "retention" are similarly defined as interchangeable concepts in Article 3 of the Hague Convention, which states:

The removal or the retention of a child is to be considered wrongful where -

(a) it is in breach of rights of custody attributed to a person , an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention ; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State. (Emphasis added.)

[6] As the term "retention" is not accorded any separate definition in either the Hague Convention or the Act it is to be attributed its ordinary meaning of "keep possession of" but within its statutory context. Whether there has been a wrongful retention will be a question of fact in each case, not however to be determined arbitrarily but the in context of s 12 Act and the incorporated Art 3.

[7] The same concept of "habitually resident" is an element of s 4 of the Act also, which defines rights of custody as follows:

4. Rights of custody

For the purposes of this Part of this Act, the term "rights of custody", in relation to a child, shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence, attributed to a person, institution, or other body, either jointly or alone, under the law of the Contracting State in which the child was habitually resident immediately before the removal or retention of the child.

[8] In the judgment of the Family Court in this case, Judge Grace referred to the House of Lords decision in re H (Abduction: Custody Rights) (1991) 2 AC 476. There Brandon LJ made certain observations about the meaning of "wrongful retention" for the purposes of the Convention. He opined that a child can only be wrongfully retained in a Contracting State, other than the State of its habitual residence, if it has first been removed rightfully (eg under a Court order or by an agreement between its two parents) out of the State of its habitual residence and subsequently retained wrongfully (eg contrary to a Court order or an agreement between its two parents) instead of being returned to the State of its habitual residence. He said the typical (but not necessarily the only) case of a child in the category of wrongful retention is the situation of a child who is rightfully taken out of the State of its habitual residence to another Contracting State for a specified period of staying access with its non-custodial parent and wrongfully not returned to the State of its habitual residence at the expiry of that period.

[9] The situation in the present case does not involve the failure to return children after an access visit with a non-custodial parent. Rather, the situation is one of a shared joint custody arrangement whereby it was agreed that the children would live with each parent on an alternating basis for equal amounts of time. Such arrangements are not unique and might involve shared custody between homes within the same jurisdiction or equally between homes in different Contracting States. One question that has arisen in this case, where the arrangement is between two Contracting States, is whether the habitual residence of the children changes according to the Contracting State in which they currently reside.

Grounds of appeal

[10] The appeal was advanced on two grounds: first, that Judge Grace had erred in finding that the children had been wrongfully retained in New Zealand; secondly, that as at the date of Mrs P's application to the Family Court in Porirua they were not habitually resident in Australia. Rather, that New Zealand had become their country of habitual residence by virtue of the time they had spent in New Zealand and because of the "shuttle" nature of the custody arrangement. This second ground of appeal was not argued before Judge Grace and thus there is no finding at first instance in relation to it, Mrs P having apparently conceded in the Family Court that of the four criteria to be established under s 12 of the Act, (a), (c) and (d) were made out. However on appeal in this Court, she contended that criteria (d), which relates to habitual residence, was not established and thus there was no proof of a removal (in the sense of a retention) because there was no proof that the children had been habitually resident in Australia immediately before the alleged retention. Rather they were habitually resident in New Zealand at that time.

[11] Notwithstanding the general nature of the appeal and the fact that criteria 12(d) had been conceded in the Family Court, I agreed to hear and consider argument on the point.

Factual background

[12] The timing and sequence of events leading to Mr P's application under the Hague Convention is, in my view, significant.

[13] The parties separated on 22 March 2001. On 7 January 2002 Mrs P advised Mr P that she intended relocating to New Zealand in three weeks' time and would be taking the children with her. Mr P was upset by this advice and concerned that if the children were taken to New Zealand he would lose regular contact with them and his relationship with them would be disrupted. No formal custody arrangements were in place at the time, so Mr P made immediate application to the Family Court in Brisbane, on 10 January 2002, seeking appropriate orders, including an interim order for Mrs P to surrender to the Court any passport she held in the names of the children and an order restraining her from removing or attempting to remove the children from Australia. An urgent hearing date was set for 29 January 2002.

[14] Following the lodging of Mr P's application in the Family Court, discussions took place between the parties, as a result of which they reached an amicable agreement about custody arrangements. They agreed that Mrs P would take the children to New Zealand for a period of two years, at the end of which they would be returned to Australia to Mr P's care for the following two years. This consecutive custody arrangement was to continue until the children reached 18 years of age. The agreement was embodied in a statutory declaration which both parties signed on 18 January 2002. The agreement was then lodged with the Family Court in Brisbane and in consequence Mr P discontinued his application for formal orders. The exact terms of the relevant parts of Mr and Mrs P's agreement, as recorded in their statutory declaration as lodged with the Court, are as follows:

. . .

4. That each parent have responsibility for making decision about the day to day care and development of the said children of the marriage.

5. That upon an amicable agreement with A P to take the said children of the marriage to New Zealand, I agree to return the children to A P for full care for a period of two years as so A P can maintain a relationship with the said children, I agree to continue with this until the children are 18 years old.

[15] Once the agreement was lodged, Mr P advised the Australian Federal Police that the children's names could be taken off the Family Law Watch List and on 7 February 2002 Mrs P departed for New Zealand with the children. On 4 July 2002 however, five months later, she applied to the Family Court in Porirua for sole custody of the children, stating in her supporting affidavit:

I am beginning a new life in New Zealand and I believe that my children should have the security of knowing that they will not have to be returned to Australia to start a new life again in two years time.

[16] Her application to the Family Court in Porirua was on notice and immediately upon being served with a copy of it Mr P applied under the Hague Convention for the return of the children.

[17] The timing of events as outlined above does have some significance, in my view, because although the sentiment expressed by Mrs P in her supporting affidavit is to an extent understandable, the fact that she applied to the Family Court in New Zealand for sole custody of the children only five months after agreeing to a long-term joint custodial arrangement with their father, tends to create the impression that she may have entered into that agreement without total commitment and simply to effect a lawful removal of the children from Australia. Such impression finds reinforcement in a statement later made by Mrs P in an affidavit she filed in opposition to Mr P's Hague Convention application. In that affidavit she said:

At the time of signing the agreement my preference would have been to keep the children in my care forever, however these were the conditions that A insisted on before he would let me take E and Z.

[18] Mrs P however does go on to say that at the time of signing the agreement she intended to fully abide by it, but she also says:

The agreement . . . anticipated that I might not return the children after two years and included a condition that if I failed to do so then I would forfeit all support, including child maintenance from A.

[19] The term of the agreement relating to forfeiture of support for herself and the children was pleaded as part of Mrs P's initial defence to the Hague Convention application; she contending that the inclusion of such a penalty provision, coupled with Mr P's consent to the children being in New Zealand for the lengthy period of two years, amounted to a consent by him to the children remaining in New Zealand permanently.

[20] As I have already noted, the sequence and nature of above events indicates, in my view, that despite Mrs P's statement that she fully intended to abide by the agreement at the time she signed it, she may have only signed the agreement to achieve the children's lawful

removal from Australia whilst nevertheless hoping to find some way of avoiding the agreement once she was in New Zealand.

The issues

[21] Under Australian law both Mr and Mrs P retain parental responsibility for the children, this being the equivalent of joint custodial rights under the Hague Convention and under New Zealand law. Joint parental responsibility persists until the children obtain 18 years of age and as with custody within the meaning of the Hague Convention, does not depend on the making of any formal order in any Contracting State but arises and enures until and unless there is a Court order to the contrary.

[22] The issue underpinning the first ground of appeal is whether the making of a formal application to the New Zealand Family Court on notice by Mrs P for sole custody of the children, constituted a recision of her agreement with Mr P, that was not merely anticipatory in nature but contravened his rights of parental responsibility under Australian law and amounted to a wrongful retention of the children under the Hague Convention and the Act.

[23] That issue raises the further question of whether the making of an application on notice to a Court and the making of orders by that Court can per se be "wrongful". That question has however been well settled, for example, in In re A.Z. (A Minor) (Abduction: Acquiescence) [1993] 1 FLR 682, where Sir Michael Kerr, at 689, confirmed that an ex parte application for an order prohibiting the removal of a child from the jurisdiction constituted a wrongful retention under the Convention although it was an otherwise lawful and unconcealed application to a Court.

[24] In establishing whether there has been a breach of Hague Convention rights, it is first necessary to identify the event which gave rise to the alleged breach and also identify the point at which that event arose. This point may be when an intention not to return a child rightfully removed under an agreement or a Court order manifests. What amounts to a manifestation of intention, as opposed to a state of mere anticipation, is the central issue in this case.

[25] The second ground of appeal which relates to habitual residence is, in my view, essentially an issue as to forum conveniens.

Judgment of the Family Court

[26] After listing a number of factors which he considered relevant in determining whether the breach of Mr P's rights was not merely an anticipatory infringement but amounted to a wrongful retention, Judge Grace concluded that Mrs P's act of filing her application for sole custody in a New Zealand Court, accompanied by a supporting affidavit setting out her sworn intention not to return the children at the end of the agreed two year period, constituted an act of wrongful retention. His reasoning for this is summarised in the following extracts and paragraphs from his judgment, in which he said:

Retention must relate to conduct on the part of one parent which has the effect of taking control of a child or children which is contrary to the rights and expectations of the other parent's right of custody. The question therefore comes down to whether or not the actions of Mrs P in making her application for custody upon the grounds deposed to in her affidavit amount to a retention in those terms.

. . .

In one sense the answer . . . must be yes. This is because the purpose of the application for custody is to empower Mrs P with the ability to assume, legally, the day to day care of the children, and consequent upon that, to seek to make decisions about where the children will continue to reside. Clearly her stated intention is that the children will continue to reside in New Zealand and not return to Australia at the end of the agreed two-year period

. . . Not only has Mrs P made her intention clear, she has also taken active steps in an effort to achieve that end. This represents a unilateral determination by her not to fulfill her obligation incumbent upon her terms of the agreement between the parties. . . .

Retention is an event that occurs at a particular point in time. If it has occurred then the Convention comes into play at that point. In the event that there is retention is it open to the Court to say that because there is still time to run under the earlier agreement the "offending party" may change her mind?

In the present case Mrs P could still return the children to Australia at the end of the agreed two-year period. However I have come to the view that Mrs P has breached the terms of the agreement by making her application for custody on the grounds that the children should know that they do not have to return to Australia. That action by Mrs P must amount to an act of retention because its purpose is to remove Mr P from a custodial role. If there is a breach then there is a breach and that is the end of the matter. The Court should not resile from making what may be an unpalatable decision at that point by considering that Mrs P may change her mind in the future.

[27] As is clear, Judge Grace considered, in the course of this reasoning, whether the fact that the agreed two-year period yet had time to run meant that any breach could only be anticipatory and consequently insufficient to invoke the provisions of the Hague Convention. On this issue, his attention had been drawn by counsel to two apparently conflicting decisions: one of the Family Division of the English High Court, In Re S (Minors) (Abduction: Wrongful Retention) [1994] 2 WLR 228; and one of the United States Court of Appeal (First Circuit), Toren v Toren 191 F 3rd 23, 27 (lst circ 1999).

[28] In Re S concerned an Israeli couple who took their children to reside in England with them during a sabbatical year. During that year their relationship broke down and the father returned to Israel, where he commenced proceedings for divorce. The mother remained in England with the children and in the month following the father's departure obtained interim ex parte orders for the children to remain resident in England. The father then applied under the Hague Convention for the immediate return of the children on the ground that the mother was wrongfully retaining them in England in breach of his custody rights. In opposition, the mother maintained that the children had acquired habitual residence in England and stated that she did not intend to return the children to Israel either before or after the expiration of the agreed period. The Court, sitting at first instance, held:

The question, in my judgment, thus becomes does the fact that the mother has stated her intention not to return the children to Israel at all mean that there is a wrongful retention as at the date that intention is either formed or when it is communicated to the father, even though the period in which she is entitled to remain the children in England has not yet expired?

In the absence of authority, my answer to this question might well have been "No". An intention not to return after a given date, which intention is capable of being changed should not, in principle, render wrongful what has been agreed - namely retention up to the date in question. However, on reflection, I have come to the conclusion that both the terms of article

3 and In re A.Z. (A Minor) (Abduction: Acquiescence) [1993] 1 F.L.R 682 require a different answer.

. . . Equally, as an issue of fact, it seems to me that the decision which precedes the announcement, even if not communicated to the father, must be capable itself of constituting an act of wrongful retention.

I therefore find that by announcing her intention not to return the children to Israel at all and by asserting that she and the children have acquired habitual residence in England, the mother has wrongfully retained the children in England as at the date of that announcement. On the facts of this case the statement in her affidavit that she has settled and made a life in England is evidence of a previous determination to retain the children in England, which is capable of being fixed in time and which, whilst there is no direct evidence of when it was formed, I fix in time prior to the filing of the originating summons and upon or shortly after receipt of the letter from the father of 6 May 1993.

[29] The judgment upon which the Judge in In Re S relied, that of the English Court of Appeal in In re A.Z. , had not in fact turned on the question of anticipatory breach but rather on acquiescence. It was not therefore directly in point in In Re S and nor is it directly in point in the present case. It does however contain certain statements of principle which are helpful. For instance, a passage in the judgment of Sir Michael Kerr at 689, where he states that whilst an uncommunicated decision taken in the mind of one parent not to return a child at the end of an agreed period could hardly constitute a wrongful retention during that agreed period, an ex parte application for a residency order and an order prohibiting the child's removal would amount to a wrongful retention within the meaning of the Hague Convention. That statement is of direct application to the present case.

[30] In the apparently conflicting decision of Toren v Toren, the parties in that case divorced in 1994 and obtained a divorce judgment in Israel endorsing their agreement that the children would live in Israel for at least two years. Their agreement was subsequently varied by a written agreement dated May 1996, which provided for the children to live with their mother in Massachusetts, not beyond 21 July 2000. Sole jurisdiction over matters connected with the agreement was vested in the Israeli Courts and approved by the Jerusalem District Court. On 1 July 1997, the mother filed an application for custody in the United States of America (''USA''), seeking to modify the terms of the divorce judgment and was granted custody after an ex parte hearing that same day. She later sought an amendment to that application, which was granted. The father then made application under the Hague Convention for the return of the children on the ground that the mother's applications and her supporting statements evidenced a clear intention by her to retain the children in USA beyond 21 July 2001; or alternatively that the mere filing of the mother's custody application equated to a wrongful retention. The Court found no evidence of an intention to so wrongfully retain the children after the agreed period and further found that even if she did have such an intention, neither the Hague Convention nor USA law would enable the Court to exercise jurisdiction, as the father's application was based on a future intention and no remedy could be sought for an anticipatory violation. As to whether the mother's application to a USA Court amounted to a jurisdictional breach, the Court held that, whilst that may amount to a breach of the jurisdictional agreement between the parties, such breach did not constitute a breach of the Hague Convention.

[31] Notwithstanding the apparent conflict between In re S and Toren v Toren, Judge Grace felt able to conclude that, on the facts of the present case, Mrs P had breached the terms of her agreement with Mr P at the point at which she made her application for custody and stated her grounds for doing so. He found that her action in making the application on those

grounds equated to an act of retention because its purpose and effect was to remove Mr P from his custodial role. This was so, even though there was time yet to run under the agreement and against the possibility that Mrs P may change her mind before the agreed period expired. In reaching his conclusion, Judge Grace had regard to but discounted the following statement made by Mrs P in her affidavit in response to Mr P's Hague Convention application:

Since applying for custody I have been served with A's application for the return of E and Z to Australia. I have thought long and hard about this matter and have tried to do what I think is best for the children. I have come to the conclusion that we may in fact return to Australia. I cannot say at this time whether I will or not. All that I can say is that unless ordered by a court I will do what I think is best for the children.

Discussion

Were the children wrongfully retained in breach of Mr P's rights?

[32] The answer to that is "yes". Whilst it is clear that there are some apparently conflicting decisions relating to Hague Convention applications in the situation where one custodial parent has resiled from an agreement or acted contrary to an existing Court order, I am in no doubt that Judge Grace's decision in the present case is correct. The approach that he took finds support in a number of the cases and it is clearly in accordance with the governing principles of the Hague Convention. In any event, each of those apparently conflicting decisions was decided on its own facts and although the outcomes may appear different, the application of principle in each is consistent.

[33] The point at which Mrs P made her application for sole custody of the children on the grounds that they should know that they did not have to return to Australia was identified by Judge Grace as the point of time at which the wrongful retention occurred. He considered that that action on her part must amount to an act of retention because its purpose was to remove Mr P from his custodial role. The Judge's finding on that issue is, in my view, unassailable. Mrs P's application, supported as it was by a sworn affidavit setting out her intention not to return the children at the end of the agreed two year period, clearly amounted to conduct on her part which had the effect of taking control of the children, contrary to the parental rights being exercised by Mr P and contrary to his expectations. A wrongful retention for the purposes s 12 of the Act means a retention "in breach of the rights of custody attributed to a person, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention". Parental rights under Australian law vest in both parents and Australia is the P children's country of habitual residence, as was conceded by Mrs P at first instance and for the reasons I shall shortly elaborate. The children's translocation to New Zealand for an agreed period of two years did not alter that.

[34] Furthermore, Mrs P's decision to apply to the Family Court in New Zealand for sole custody was a unilateral decision and not done in consultation with Mr P. As Judge Grace put it, her application ". . . represents a unilateral determination by her not to fulfil her obligation incumbent upon her in terms of the agreement between the parties . . . ". As Mr P makes quite clear, he does not agree to the order for which Mrs P now applies and his agreement is as embodied in the parties' statutory declaration.

[35] Finally, in relation to the fact that there was still time to run under the earlier agreement and Mrs P's subsequently expressed equivocation over her intentions, Judge Grace was satisfied that neither factor altered the situation of wrongful retention. Thus he found the breach to be not merely anticipatory but actual. With respect I agree.

[36] The appeal must fail on this ground.

Habitual residence

[37] The appellant's essential argument under this head was that as the parties had agreed that Mrs P could bring the children to New Zealand for a period of two years, they ceased to be habitual residents of Australia at the moment they departed from Australia. In the alternative, if the children had not lost their habitual residence in Australia immediately on their departure for New Zealand, they had obtained habitual residence in New Zealand by the time of their alleged wrongful retention. Either way, the effect of the argument is that, by the time Mr P applied for the return of the children, they had ceased to be habitually resident in Australia for Hague Convention purposes.

[38] Mr Foster's argument under this head relied first on proof of a settled intention on the part of both parents, which he said was evidenced by their formal written agreement; and secondly, on proof of a period of settled residence, that being the five month period for which the children had been residing in New Zealand since their arrival. Mr Foster's submission was that period of five months, of itself, together with the circumstances of the children's settlement in New Zealand should satisfy the Court that they were habitually resident in New Zealand by the time of Mr P's application.

[39] In relation to proof of a settled intention on the part of both parents, Mr Foster argued that the joint custodial arrangement was a "shuttle custody" arrangement which evidenced a settled intention on the part of both as to their children's habitual residence. The nature of this arrangement meant the children's habitual residence was intended by both parents to change each time they moved from the jurisdiction of one Contracting State to the other. The critical factor was the loss of habitual residence in the Contracting State from which the children departed. Mr Foster cited various authorities in support of this argument, including reference to the learned authors of The Hague Convention on International Child Abduction (Beaumont P D and McEleavy P E, OUP, Oxford 1999).

[40] Particular reliance was placed on the decision in Watson (AP) v Jamieson [1996] Scots J No 257. In that decision the Court had refused an application under the Hague Convention for the return of children to their mother in New Zealand after their father in Scotland had indicated to her that he would not return the children at the end of the agreed period. The agreement between the parents had been for the children to reside alternately for two-year periods in the country of each parent. The case turned on the question of habitual residence, with the Court holding that it was quite unrealistic to describe the children's habitual residence as being in New Zealand and that they were, at the time, habitually resident in Scotland. The Court further found that in any event the petition was premature because the agreed period had not yet expired. The relevant extract of the judgment, for the purposes of the present case, is at p 182:

. . . where residence with the two parents is divided equally, its strikes me as unreal, in the absence of other differentiating factors, to see residence with one parent as primary, and the stays with the other parent as interruptions. Moreover, where as in the present case the periods with each parent are so long, it seems to me that the parents have (very commendably) chosen long periods precisely so that the girls would not feel that they were constantly being swapped to and fro, but would have long enough, whichever parent they were with, to feel that there was a firm and lasting basis for their presence with the parent in question.

[41] Mr Foster urged me to adopt the above reasoning from Watson (AP) v Jamieson, which he submitted was consistent with the reasoning in Toren v Toren and preferable to that in In re S and In re A.Z .

[42] With respect I am unable to do so. The situation in the present case is one where joint custodial parents (as the persons entitled to fix their children's residence) have ceased to agree on that issue as the result of one of them seeking to resile from the agreement. The situation is not one where Mr P conceded jurisdiction to the New Zealand Family Court for Hague Convention purposes by agreeing to the joint custodial arrangement. By so agreeing he neither relinquished his parental responsibility under Australian law, nor conceded jurisdiction to the New Zealand Family Court. The evidence is to the contrary. The evidence is that he commenced proceedings in the Australian Court and notified border control of the children's possible abduction. He subsequently took care to ensure that the agreement the parties reached was formally recorded in a statutory declaration and lodged with the Family Court in Brisbane before discontinuing his proceeding and advising border control that the children could leave Australia. On the basis of such evidence, he cannot be said to have conceded jurisdiction and ceased to exercise his joint custodial rights simply by agreeing that Mrs P could rightfully remove the children from Australia for a specified period. What Mrs P appears to be now doing, having crossed an international boundary with his permission, is to seek "a more sympathetic court". That phrase comes from the judgment of the United States Court of Appeals for the Ninth Circuit in Mozes v Mozes , 9 January 2001. In Mozes v Mozes the Court refers to a primary concept of the Convention being:

. . . a primary purpose of the Convention: to preserve the status quo and to deter parents from crossing international boundaries in search of a more sympathetic court.

[43] The facts in Mozes v Mozes were not dissimilar to the facts in Toren v Toren, although the outcome was different. Many of the principles, as restated in Mozes v Mozes , assist. For instance, the reminder that habitual residence (albeit undefined in the Hague Convention) is a question of fact which differs from domicile and this was a matter of deliberate policy. The statement that ". . . the aim [is] to leave the notion of habitual residence free from technical rules which can produce rigidity and inconsistencies as between different legal systems" (quoting from Dicey and Morris on the Conflict of Laws 144 (10th ed. 1980). Of this Court said at p 8:

Clearly, the Hague Conference wished to avoid linking the determination of which country should exercise jurisdiction over a custody dispute to the idiosyncratic legal definitions of domicile and nationality of the forum where the child happens to have been removed. This would obviously undermine uniform application of the Convention and encourage forum-shopping by would-be abductors. To avoid this, courts have been instructed to interpret the expression "habitual residence" according to "the ordinary and natural meaning of the two words it contains[, as] a question of fact to be decided by reference to all the circumstances of any particular case." C v S (minor: abduction: illegitimate child) [1990] 2 All E.R. 961,965 (Eng H.L).

[44] I deem it unnecessary to retraverse various statements of other Courts about the distinction between "habitual residence", "ordinary residence" and "domicile". It is the concept of "habitual residence" in the context of the Hague Convention and the Act which is all-important. The Hague Convention is primarily about the most appropriate forum for substantive custody rights to be determined. In the present case I have no doubt that that forum is the Australian Family Court.

[45] The Court in Mozes v Mozes also referred to the difficulty that can arise in situations where persons entitled to fix a child's residence no longer agree as to where that residence has been fixed, noting that the circumstances in which this can arise are diverse but able to be divided into three broad categories, as follows (p 21-24):

On one side are cases where the court finds that the family as a unit has manifested a settled purpose to change habitual residence, despite the fact that one parent may have had qualms about the move. Most commonly, this occurs when both parents and the child translocate together under circumstances suggesting that they intend to make their home in the new country. When courts find that a family has jointly taken all the steps associated with abandoning habitual residence in one country to take it up in another, they are generally unwilling to let one parent's alleged reservations about the move stand in the way of finding a shared and settled purpose.

On the other side are cases where the child's initial translocation from an established habitual residence was clearly intended to be of a specific, delimited period. In these cases, courts have generally refused to find that the changed intentions of one parent led to an alteration in the child's habitual residence.

In between are cases where the petitioning parent had earlier consented to let the child stay abroad for some period of ambiguous duration. Sometimes the circumstances surrounding the child's stay are such that, despite the lack of perfect consensus, the court finds the parents to have shared a settled mutual intent that the stay last indefinitely. When this is the case, we can reasonably infer a mutual abandonment of the child's prior habitual residence. Other times, however, circumstances are such that, even though the exact length of the stay was left open to negotiation, the court is able to find no settled mutual intent from which such abandonment can be inferred. Clearly, this is one of those questions of ''historical and narrative facts'' in which the findings of the district court are entitled to great deference. Feder, 63 R.3d at 222 n.9.

[46] The second category identified by the Court in Mozes v Mozes above has direct application to the situation of the P children. The P children have been translocated in accordance with the joint agreement of their parents from an established habitual residence for a specific, delimited period. The case is therefore one where the Court should refuse to find that Mrs P's altered intention should result in alteration of the habitual residence of the children for Hague Convention purposes.

[47] The following passage from pp 27-28 of the judgment in Mozes v Mozes encapsulates exactly the situation in the present case:

The Convention is designed to prevent child abduction by reducing the incentive of the would-be abductor to seek unilateral custody over a child in another country. The greater the ease with which habitual residence may be shifted without the consent of both parents, the greater the incentive to try. The question whether a child is in some sense ''settled'' in its new environment is so vague as to allow findings of habitual residence based on virtually any indication that the child has generally adjusted to life there

. . . The function of a court applying the Convention is not to determine whether a child is happy where it currently is, but whether one parent is seeking unilaterally to alter the status quo with regard to the primary locus of the child's life.

[48] In concluding its judgment, the Court in Mozes v Mozes referred to the importance of shared parental intent under the Hague Convention, expressing the view that (at p 40):

. . . Given that the Mozes children had a clearly established habitual residence in Israel in April 1997, and that the district court did not find an intent to abandon this residence in favor of the United States, the question it needed to answer was not simply whether the children had in some sense "become settled" in this country. Rather, the appropriate inquiry under the Convention is whether the United States had supplanted Israel as the locus of the children's family and social development.

[49] In the present case, it is impossible, in my view, to say that the locus of the P children's family and social development is now New Zealand, simply because they have resided in New Zealand for five months and because their mother wishes to resile from her agreement with their father as to their joint custodial arrangements. It cannot be said that Australia has been supplanted as their country of habitual residence.

[50] Despite the reasoning in decisions such as Watson v Jamieson and obiter comments of Clerk and Ross LJJ in Cameron v Cameron [1996] SC 17 at 24, the critical issue in a case such as this is whether on the facts the child has severed all links with a particular jurisdiction. If he or she has, there can be no valid reason for returning the child. That is not however the case here.

[51] To summarise, the principles of the Hague Convention are clear in relation to "habitual residence" as is the meaning and intent of the New Zealand legislation. As I noted earlier, the terms "removal" and "retention" are used interchangeably both in the Hague Convention and in the Act. In s 12(d) of the Act, the word "retention" simply supplants the word "removal" for the purpose of assessing the present situation. "Habitual residence" must be construed to mean the Contracting State in which the P children were residing at the time their parents reached the agreement which permitted their lawful removal. Australia was the country in which Mr and Mrs P reached agreement on joint custodial arrangements and the Family Court in Brisbane was the Court in which they lodged their formalised agreement. For the purposes of s 12 of the Act, Australia was therefore the children's country of habitual residence at the time of their rightful removal and the Family Court of Australia remained the Court of competent jurisdiction. The situation has not altered simply by virtue of the physical event of lawful removal. Breach of the agreement to return the children to Australia constitutes a wrongful retention of them.

[52] In any event, the issue of habitual residence so latterly raised in this case, in my view, is really an issue of forum conveniens. Mrs P is not precluded from applying for sole custody of the children in the Family Court in Brisbane. That is the appropriate forum, even though she may not find it convenient. It is however where the children's "habitual residence" remains and their translocation to New Zealand for an agreed period has not altered that situation.

[53] I am satisfied that this ground of appeal must also fail.

Return forthwith?

[54] The judgment of Judge Grace in the Family Court is, as I have said, unassailable and must be upheld. The effect of this is that the warrant issued for the return of the children to Australia will be executed forthwith. That may seem a dire outcome in the circumstances but is unavoidable. I note that Judge Grace referred to this aspect of his decision as "unpalatable" and I note also the appellant's submission about the different situation in Denmark. In Denmark the situation apparently is:

. . . that where a party agrees that the children should live with the other parent for a specified period of time, the Danish Central Authority refuses to make an application for the

return of the children until the end of the specified period, see Re H.B (Abductions: Children's Objections) [1997] 1. FLR 392, High Court England.

[55] Whilst that is not the situation under New Zealand law, it may be that Mr and Mrs P can agree on matters once again, perhaps by formalising their previous agreement in the Family Court in Brisbane by the seeking of orders on a consent basis and thus avoiding the disruption of the children being returned to Australia forthwith. There may be no necessity for this. I expect it will be for Mrs P to take the initiative, if she wishes to retain the children in New Zealand for the remainder of the agreed two-year period. She is also entitled to commence her own proceeding in the Brisbane Family Court if she wishes.

Judgment

[56] The appeal is dismissed.

COUNSEL: J Bryson and P Foster for the appellant; J D Howman for the respondent

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